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16 UNITED STATES BANKRUPTCY COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 (SAN FRANCISCO DIVISION)

19 In Re

20 PG&E CORPORATION,

21 and

22 PACIFIC GAS AND ELECTRIC COMPANY,

23 Debtors.

Case No. 19-30088 DM

CHAPTER 11

**ESC LOCAL 20'S RESPONSE TO  
DEBTORS' MOTION FOR ENTRY  
OF AN ORDER APPROVING  
SHORT-TERM INCENTIVE PLAN  
AND GRANTING RELATED RELIEF  
(DOC. 782, DOC. 806)**

- 24 ☐ Affects PG&E Corporation  
25 ☐ Affects Pacific Gas and Electric Company  
26 ☐ Affects both Debtors

27 *All papers shall be filed in the Lead Case,  
28 No. 19-30088 (DM)*

Date: April 9, 2019  
Time: 9:30 a.m.  
Location: U.S. Bankruptcy Court  
Courtroom 17, 16<sup>th</sup> Floor  
San Francisco, CA 94102

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## **I. INTRODUCTION**

Engineers and Scientists of California Local 20, IFPTE (“ESC Local 20”), the exclusive collective bargaining representative of over 3,700 of Debtors’ professional and technical employees pursuant to a collective bargaining agreement with the Debtors, hereby submits its response to the Motion of Debtors Pursuant to 11 U.S.C. §§ 105(a), 363, and 503(c) for Entry of an Order (I) Approving Short-Term Incentive Plan and (II) Granting Related Relief (Doc. 782, corrected at Doc. 806).

ESC Local 20 supports entry of an order approving the 2019 Short-Term Incentive Plan (STIP) as it relates to ESC-represented employees. ESC Local 20 takes no position on STIP payments to non-represented employees, but with respect to represented employees, PG&E is required to make these payments by the collective bargaining agreement between ESC Local 20 and PG&E.

The STIP payments to ESC Local 20 members are not incentives related to the bankruptcy; they are contractually required payments that workers rely upon as part of their compensation. The employees represented by ESC Local 20 are engineers, estimators, mappers, project managers and other professional and technical employees who are working to modernize and maintain the utility. These are working people, not officers or executives. They gave up wage increases in exchange for STIP payments in their collective bargaining agreement, and now, in negotiations pursuant to 11 U.S.C. § 1113, they have agreed to give up the contractually required STIP payments for 2018 in order to secure the STIP payments for 2019.

Unlike STIP payments to PG&E’s executives and managers, the STIP payments to ESC Local 20 members are required by the collective bargaining agreement, and PG&E has a legal duty to honor the terms of that agreement under Section 1113 of the Bankruptcy Code. *Adventure Resources, Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir. 1998) (“[T]he language employed by Congress in § 1113 is unequivocal ... It plainly imposes a legal duty on the debtor to honor the terms of a collective bargaining agreement ... until that agreement is properly rejected.” *Id.*; *In re Manor Oak Skilled Nursing Facilities*, 201 B.R. 348, 350 (Bankr. W.D.N.Y. 1996) (“[A]ll aspects

of a collective bargaining agreement remain in effect and binding until rejection occurs, including the duty to cure pre-petition arrears.”).

Accordingly, this Court should approve the 2019 STIP as it relates to ESC Local 20 members.

## II. FACTS

### 1. STIP payments are part of the negotiated wages and benefits under the collective bargaining agreement

ESC Local 20 is a labor union that represents 3,700 professional and technical employees at PG&E, including the engineers, estimators, mappers, project managers, and other professional and technical employees that have been doing the important work needed to maintain and modernize the systems and keep the public utility safe.

The terms and conditions of employment for these employees are governed by a collective bargaining agreement between ESC Local 20 and PG&E. Sperry Decl., Ex. A, Ex. B.

The collective bargaining agreement requires PG&E to pay certain employees Short Term Incentive Plan (STIP) payments as part of the employees’ compensation. Sperry Decl., Ex. A, pp. viii-x. Approximately 1,396 ESC-represented employees are eligible for these STIP payments. Sperry Decl., ¶ 5. Pursuant to the terms of the collective bargaining agreement, the STIP payments to eligible employees are calculated by multiplying that employee’s eligible earnings by their participation rate, their individual modifier, and the company score. Sperry Decl., Ex. A, p. viii. For nearly all ESC-represented employees who are eligible for STIP payments, the participation rate is currently 10%, meaning that the target level for the STIP payment is 10% of the employee’s yearly base salary.<sup>1</sup> Sperry Decl., ¶ 6. That 10% STIP award is then adjusted up or down by multiplying it by the employee’s individual modifier, which is determined by that employee’s performance rating from their supervisor, and the company score, which is based on company-wide metrics related to safety, reliability of the system, and the company’s financial performance. Sperry Decl., ¶¶ 7-8. These STIP payments are an important part of the

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<sup>1</sup> For about 10 employees in “Principal Engineer” classifications, the participation rate is 15%. The participation rate for ESC-represented employees is lower than the participation rate for managers. Sperry Decl., ¶ 6.

1 employees' compensation, which was bargained for by ESC Local 20. ESC Local 20 members  
2 were forced to give up wage increases in exchange for these payments. Sperry Decl., ¶ 10. In  
3 bargaining for the 2012-2015 collective bargaining agreement, workers gave up a wage increase  
4 of 8.25% and received an increase of only 3% to have STIP phased in over a three year period.  
5 *Id.*; Sperry Decl., Ex. C, pp. viii-ix. This was widely understood and agreed to be an exchange of  
6 base salary for pay at risk. Sperry Decl., ¶ 10. STIP payments are thus an important part of the  
7 employees' wages that the Union bargained for and won.

8 **2. ESC Local 20 agreed to give up 2018 STIP payments in exchange for 2019**  
9 **STIP payments**

10 The STIP payments for 2018 were expected to be paid in March 2019. Sperry Decl., ¶ 14.  
11 ESC Local 20 employees would have been entitled to approximately \$29,487,708 in 2018 STIP  
12 payments. *Id.*

13 On February 22, 2019, PG&E announced that it would not be making any STIP payments  
14 for 2018, and on February 25, 2019, PG&E withdrew the request for authorization of the 2018  
15 STIP payments that it had previously made in its Employee Wage and Benefits Motion. Sperry  
16 Decl., ¶ 15; Doc. 652, p. 4. The loss of these payments was a significant hardship on ESC Local  
17 20 members who rely on these payments to meet their regular cost of living. Sperry Decl., ¶ 17.

18 ESC Local 20 filed a grievance over PG&E's decision not to pay the STIP payments for  
19 2018 in violation of the collective bargaining agreement, and objected to PG&E's failure to  
20 request authorization to honor its contractual obligations regarding STIP payments to ESC Local  
21 20 members. Sperry Decl., ¶ 18; Doc. 646. Specifically, ESC Local 20 argued that PG&E was  
22 barred from unilaterally terminating the collective bargaining agreement's requirement to make  
23 STIP payments. This was a violation of the collective bargaining agreement, and a violation of  
24 Section 1113 of the Bankruptcy Code, which prohibits a debtor in possession from terminating  
25 any provision of a collective bargaining agreement prior to negotiating with the union and  
26 following the carefully laid out procedures for modification. 11 U.S.C. § 1113(f) (a debtor in  
27 possession shall not "unilaterally terminate or alter any provisions of a collective bargaining  
28 agreement prior to compliance with the provisions of this section").

1 PG&E and ESC Local 20 then entered into negotiations over the STIP payments. As the  
2 result of these negotiations, the parties reached a Memorandum of Understanding to modify the  
3 collective bargaining agreement. Sperry Decl., ¶ 20, Ex. E (MOU on STIP awards). ESC Local  
4 20 agreed to settle its grievance regarding PG&E's failure to pay the 2018 STIP awards and forgo  
5 all payment of 2018 STIP awards in exchange for an increase in participation rates for the 2019  
6 STIP awards by 25%. Sperry Decl., ¶ 20, Ex. E. ESC Local 20 also agreed to other  
7 modifications of the STIP design, including the switch from annual payment to quarterly  
8 payments. Sperry Decl., Ex. E.

9 This modification to the collective bargaining agreement is contingent upon the approval  
10 of this Court. Sperry Decl., Ex. E. Should this Court deny this motion with regard to ESC Local  
11 20 members, it will constitute a violation of Section 1113, the Union's grievance regarding the  
12 2018 STIP payments will be reinstated, the Union will have a claim for the 2018 STIP payments,  
13 and the agreed-to modification to the collective bargaining regarding the 2019 STIP payments  
14 will be nullified.

### 15 **III. ARGUMENT**

16 Section 1113 of the Bankruptcy Code provides special protection to collective bargaining  
17 obligations by barring a debtor in possession from modifying or terminating a collective  
18 bargaining agreement without engaging with the union in good faith and following the procedures  
19 carefully laid out in Section 1113.<sup>2</sup> This is the exclusive method of terminating any obligations in  
20 a collective bargaining agreement. 11 U.S.C. § 1113(a) (a debtor may reject a collective  
21 bargaining agreement "only in accordance with the provisions of this section"). "No provisions  
22 of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions

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23 <sup>2</sup> Specifically, section 1113 requires a debtor to make a formal proposal to modify the CBA based  
24 on the most complete and reliable information available at the time of the proposal. The proposed  
25 modifications must be necessary to permit the reorganization of the debtor, and they must assure  
26 that all affected parties are treated fairly and equitably. The debtor must provide the union with  
27 all relevant information that is necessary to evaluate the proposal. Between the time of the  
28 making of the proposal and the time of the hearing on the motion to reject the existing CBA, the  
debtor must meet at reasonable times with the union. At the meetings, the debtor must confer in  
good faith in attempting to reach mutually satisfactory modification of the CBA. Only if the  
union refuses to accept the debtor's proposal without good cause and the balance of the equities  
clearly favors rejection of the CBA may the court allow the debtor to modify or reject the  
agreement. *See, e.g., In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984)  
(articulating the nine-factor test for modification or rejection of a CBA under Section 1113).

1 of a collective bargaining agreement prior to compliance with the provisions of this section.” 11  
2 U.S.C. § 1113(f).

3 “[T]he language employed by Congress in § 1113 is unequivocal.” *Adventure Resources,*  
4 *Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir. 1998). “It plainly imposes a legal duty on the debtor  
5 to honor the terms of a collective bargaining agreement ... until that agreement is properly  
6 rejected.” *Id.*; *In re Manor Oak Skilled Nursing Facilities*, 201 B.R. 348, 350 (Bankr. W.D.N.Y.  
7 1996) (“[A]ll aspects of a collective bargaining agreement remain in effect and binding until  
8 rejection occurs, including the duty to cure pre-petition arrears.”).

9 Accordingly, PG&E is bound by the collective bargaining agreement’s requirement to  
10 make STIP payments to employees represented by ESC Local 20. It is not free to abandon this  
11 requirement without engaging in the process required by Section 1113. Absent the Court’s  
12 approval of the agreed upon modification of the collective bargaining agreement to terminate the  
13 requirement to make STIP payments in 2018 and institute the modified plan for 2019, PG&E is  
14 obligated to make the full 2018 STIP payment (and will be bound to make the full 2019 STIP  
15 payment).

16 As the Bankruptcy Appellate Panel of the Ninth Circuit has explained, “Section 1113 was  
17 enacted to protect employees during the interim between the filing of the bankruptcy petition and  
18 court-supervised modification or ultimate rejection of the CBA. During this period, working  
19 employees benefit the estate. Their rights accrue as services are rendered *on the basis provided*  
20 *for by the CBA.*” *Teamsters Indus. Sec. Fund v. World Sales (In re World Sales)*, 183 B.R. 872,  
21 878 (B.A.P. 9th Cir. 1995) (emphasis added). The debtor’s “employees continued employment  
22 post-petition in the ‘reasonable belief’” that the terms of their employment as laid out in the CBA  
23 would remain unchanged. *Id.* “We therefore hold that a debtor’s unperformed post-petition  
24 obligations under an unmodified or unrejected CBA are beyond the scope of § 365(g), and claims  
25 based on such post-petition breaches must be given administrative status.” *Id.* (holding that post-  
26 petition obligations to provide healthcare coverage beyond the scope of work performed pursuant  
27 to terms of a CBA that had not yet been rejected were entitled to administrative claim status, even  
28 though they might not otherwise meet the standards for an administrative claim); *see also In re*

1 *Colorado Springs Symphony Orchestra Assn.*, 308 B.R. 508 (Bankr. D. Colorado 2004) (finding  
2 that pursuant to debtor's obligation under CBA to pay musicians for minimum number of  
3 performances, whether or not musician played at all such performances, such payments entitled to  
4 administrative status for post-petition period prior to rejection of CBA).

5 PG&E is required to continue to compensate employees on the terms laid out in the  
6 collective bargaining agreement, including STIP payments. STIP payments to ESC Local 20  
7 members must be paid, and the Debtors' motion should be granted with respect to STIP payments  
8 to Local 20 members.

9 **IV. CONCLUSION**

10 For the reasons stated herein, ESC Local 20 respectfully requests that the Court grant  
11 Debtors' motion with respect to 2019 STIP payments to employees represented by ESC Local 20,  
12 authorizing the MOU between ESC Local 20 and PG&E to take effect.

13  
14  
15 Dated: March 28, 2019

WEINBERG, ROGER & ROSENFELD  
A Professional Corporation

16  
17 By: /s/ Emily P. Rich  
EMILY P. RICH

18 Attorneys for Creditor Engineers and Scientists of  
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20 Local 20, IFPTE

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1 **CERTIFICATE OF SERVICE**

2 I am a citizen of the United States and an employee in the County of Alameda, State of  
3 California. I am over the age of eighteen years and not a party to the within action; my business  
4 address is 1001 Marina Village Parkway, Suite 200, Alameda, California 94501.

5 I hereby certify that on January 30, 2019, I electronically filed the forgoing @ with the  
6 U.S. Bankruptcy Court, Northern District California, by using the Court's CM/ECF system.

7 Pursuant to controlling General Orders and LBR, the foregoing document will be served  
8 by the court via NEF and hyperlink to the document. On March 28, 2019, I checked the CM/ECF  
9 docket for this bankruptcy case or adversary proceeding and determined that the following  
10 persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses  
11 stated below:

12 SEE ATTACHED SERVICE LIST

13 On January 30, 2019, I served the following persons and/or entities at the last known  
14 addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy  
15 thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed  
16 as follows. Listing the judge here constitutes a declaration that mailing to the judge will be  
17 completed no later than 24 hours after the document is filed.

18 SEE ATTACHED SERVICE LIST

19 I certify under penalty of perjury that the above is true and correct. Executed at Alameda,  
20 California, on January 30, 2019.

21  
22  
23  
24 /s/ Stephanie Mizuhara  
Stephanie Mizuhara



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